PUBLIC COMMENTS OF THE PENOBSCOT NATION REGARDING MAINE'S APPLICATION FOR APPROVAL OF WATER QUALITY STANDARDS FOR APPLICATION WITHIN THE PENOBSCOT INDIAN RESERVATION

September 13, 2013

The Penobscot Nation (the "Nation" or the "Tribe"), through counsel, hereby submits its written Public Comments to the United States Environmental Protection Agency (the "EPA") on the request of the State of Maine (the "State" or "Maine") to the EPA for approval, within the Nation's Indian territory, of a set of water quality standard (WQS) revisions regarding the human health ambient water quality criteria of the allowable levels in surface waters for three toxic pollutants: arsenic, acrolein and phenol under section 303(c) of the Clean Water Act, 33 U.S.C. § 1313.

BACKGROUND

Rather than fully restate relevant background information that the EPA is already familiar with, the Nation incorporates herein by reference its Public Comments dated February 9, 2000 and all attachments thereto, and its Supplemental Comments dated August 21, 2000 and all attachments thereto on the Application of the State of Maine to the EPA for the Authorization to Administer the NPDES Program in Indian territory ("NPDES Public Comments").[1] The Penobscot Nation summarizes some of that background:

[1] All of this material was eventually compiled as part of the Joint Appendix for the matter of *Maine v. Johnson* before the U.S. Court of Appeals for the First Circuit and the Nation incorporates that Joint Appendix by reference herein as well as its own submissions therein. The Nation references certain material here in accordance with the exhibits it provided as part of the NPDES Public Comments. All of the facts stated herein in reference to the NPDES Public

1. The Penobscot Nation is a federally recognized Indian tribe, which, since aboriginal times, has occupied the Penobscot River watershed and relied upon its water and resources for physical, cultural, and spiritual sustenance.

2. The EPA has never approved any of Maine's WQS in the Penobscot Indian Reservation.[2]

3. The Penobscot Nation has twice requested the EPA to promulgate federal water quality standards for the Penobscot River, but the EPA has not acted on those requests. *See* Exhibit 13 to NPDES Public Comments.

4. The United States Department of the Interior ("DOI") is charged with authority to administer the Maine Indian Claims Settlement Act of 1980 (the "Settlement Act"), and is, therefore, afforded deference in its views on rights and authorities thereunder.

5. DOI has informed the EPA that

   a. pursuant to the Settlement Act, Congress confirmed the right of Penobscot Nation tribal members to take fish from the Nation's reservation waters in the Penobscot River for their sustenance as "an expressly retained sovereign activit[y], . . . a reservation from the

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Comments continue today. If the EPA would like the Nation to resubmit copies of any specific materials made part of the prior agency record or to otherwise verify facts set forth herein, the Nation will to do so.

[2] Currently before the EPA is a request for the approval of WQS with regard to three pollutants: arsenic, acrolein and phenol. No other WQS are currently before the EPA for approval in Indian territories in Maine.

aboriginal rights given up by the Penobscot Nation," Exhibit 17 to NPDES Public Comments;

b. the Penobscot Indian Reservation, in which this protected sustenance fishery is located, includes the waters surrounding Indian Island, the principal residence of Penobscot Nation members, and other islands northward thereof, *id.*;

c. "when taking federal actions which affect tribal resources, . . . EPA's fiduciary obligation [to the Penobscot Nation] requires it to first protect Indian rights and resources," *id.*;

d. the Penobscot Nation has "the right to take fish and the right that others not unreasonably pollute the waters" in its reservation, *id.* at 6-7.

e. the Nation's federally protected "right to take fish for individual sustenance within the boundaries of the reservation . . . demands that there be sufficient fish to take and that such fish be safe to eat," Exhibit 14 to NPDES Public Comments;

f. the EPA "must ensure that environmental degradation, such as exists on the Penobscot River, not be allowed to impair the Nation's fishing rights," *id.*;

g. "due to the island location of its reservation, the Penobscot Indian Nation is subject to a disproportionate burden of the risks and the harms occasioned by [pollutant dischargers]" into the Penobscot River, *id.*

7. The EPA acknowledges that it has a trust obligation to protect the Penobscot Nation's sustenance fishery in the Penobscot River. *See. e.g.,* Exhibit 15 to NPDES Public Comments.

8. The Nation's members rely upon that fishery for their individual sustenance and for ceremonial purposes, central to the Penobscot culture. *See, e.g.,* Exhibits 1, 2, 4, 5, 6, 10, 14, 16 and 19 to NPDES Public Comments.

9. Maine rejects the view that the Penobscot Nation's reservation extends into the Penobscot River and, therefore, includes a sustenance fishery therein that deserves any safeguards to ensure that the fish are safe to eat or can sustain tribal members. *See* Letter from William Schneider, submitted herewith; *see also* Maine's Briefs to the U.S. Court of Appeals for the First Circuit in the matter of *Maine v. Johnson*.

LEGAL ARGUMENT

Overview

Congress confirmed that the Penobscot Indian Reservation includes a fishery within the Penobscot River to sustain the members of the Penobscot Nation. This was a fundamental purpose of the reservation. As such, the Nation's reservation includes not only the fishery for use by the Tribe's members, but a fishery that must be of a quality to provide them with sustenance. By virtue of Congress having set aside such a reservation for the Penobscot people, they are entitled to water quality within the Penobscot River surrounding their reservation islands that will support fish that they may consume for their subsistence. *See U.S. v. Adair*, 723 F.2d 1394, 1414-15 (9th Cir. 1984). The so-

called *Winters* doctrine, grounded in *Winters v. United States*, 207 U.S. 564 (1908), requires nothing less. *See Adair*, 723 F.2d at 1412-15.

States lack jurisdiction in Indian reservations absent express authorization by Congress. *E.g., Wisconsin v. E.P.A.*, 266 F.3d 741, 747 (7th Cir. 2001); *State of Washington, Dep't of Ecology v. U.S.E.P.A.*, 752 F.2d 1465, 1469 (9th Cir. 1985) (citing cases). Pursuant to the Settlement Act, Congress granted Maine certain regulatory jurisdiction not granted to most other states, but made perfectly clear that with regard to the Penobscot Nation, "internal tribal matters," including the aboriginal right of tribal members to take fish from the Penobscot Indian Reservation "for their individual sustenance," "shall not be subject to regulation by the state." 25 U.S.C. §§ 1721(b), 1725(h), ratifying 30 M.R.S.A. §§ 6206(1) (state may not regulate "internal tribal matters"), 6207(4) (Nation has exclusive jurisdiction over sustenance fishing, other than limited residual authority granted to Maine).

Here, the State asks that EPA approve a set of WQS that purport to set an acceptable (to the State) cancer risk and an acceptable (to the State) fish consumption rate for *the sustenance* of Penobscot Tribal members in the exercise of the Nation's "expressly retained sovereign activity" within the Penobscot Reservation. However, the State has no jurisdiction to regulate the Nation's sustenance fishery, or the internal tribal matter of what is an acceptable cancer risk for tribal members eating fish out of the Tribe's reservation waters.

Under the Clean Water Act and its implementing regulations, EPA cannot approve any Water Quality Standards if they are insufficient to "protect the designated water

uses," which, with regard to Indian territories in Maine include protection of the human health of a sensitive subpopulation of subsistence fishers, members of the Penobscot Nation. 33 U.S.C. § 1313(c)(2)(A); 40 CFR 131.5(2). In asking EPA to approve its water quality standards, Maine is asking the EPA to sanction the State's assertion of what is an acceptable cancer risk and fish consumption rate for the *sustenance* of members of the Penobscot Nation. This is plain from the language in the State's WQS submittal: "Using a cancer risk factor of 10E-6, Maine maintains that the 32.4 gram/day fish consumption rate is … protective of *the higher-end sensitive subpopulation of Native American*" anglers based on a study expressly criticized by the tribe in the comment process. *See* DEP Response to Comments, at 20 (May 25 2012). The State then goes on to conclude that, "Maine believes that the validity of the study and the protective nature of its revised fish consumption rate for sensitive subpopulations (138 grams/day) are demonstrated. *Id.* at 21. Such a determination is a direct regulation of the aboriginal right of the Nation's members to take fish for their individual sustenance, an internal tribal matter over which the State obtained no jurisdiction from Congress under the Settlement Act.

The EPA therefore cannot approve Maine's Water Quality Standards in the Penobscot Indian Reservation, in particular, the sustenance fishery.

Further, pursuant to the Constitution, the federal government, including the EPA, holds a trust responsibility to protect the authorities and resources of the Penobscot Nation. That trust responsibility cannot be delegated to Maine. (Indeed, Maine refuses to even recognize the existence of the Nation's reservation sustenance fishery.) The

EPA's approval of Maine's WQS with respect to the Nation's reservation sustenance fishery would therefore constitute an unlawful delegation of its federal trust responsibility to Maine, a delegation that would be a breach of its trust responsibility and an action that is constitutionally suspect.

I. The EPA's Constitutionally-Based Trust Responsibility Requires It to Reject Maine's Application.

Water quality associated with the Nation's sustenance fishery in the Penobscot Indian Reservation is a matter of physical and cultural survival for the Penobscot people. The EPA readily recognizes that Indian tribes, like the Nation, "see protection of the reservation environment as essential to the preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others." EPA, *Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* (July, 1991). "[C]lean water, including critical habitat (i.e. wetlands, bottom sediment spawning beds, etc.), is absolutely crucial to the survival of . . . Indian reservations." 56 Fed. Reg.64,876, 64,878 (Dec. 12, 1991). This is plainly true for the Penobscot Nation's reservation sustenance fishery.

The United States has a trust obligation to Indian nations of the highest order, which necessarily includes the protection of their reservation resources, here the Nation's sustenance fishery in the Penobscot River. This trust responsibility has its origins in the constitutional responsibility for Indian affairs lodged in Congress and in Chief Justice Marshall's foundational Indian law decisions interpreting that responsibility. *See*

Worcester, 31 U.S. at 551-52, 555 (protection that United States owes to Indian nations involves "a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master"); *see also Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985) (discussing trust doctrine and its grounding in the Constitution). As Senior Ninth Circuit Judge William Canby has explained, "[o]ne of the basic premises underlying the constitutional allocation of Indian affairs to the federal government was that the states could not be relied upon to deal fairly with the Indians." Canby, *American Indian Law* (West 2005). This is a consideration of critical importance to the matter at hand.

The Ninth Circuit (through Judge Canby) elaborated upon this constitutionally based trust responsibility in *State of Washington, Dep't of Ecology v. U.S.E.P.A.,* 752 F.2d 1465 (9th Cir. 1985):

> Accompanying the broad congressional power [over Indian affairs under the Constitution] is the concomitant federal trust responsibility toward the Indian tribes. . . . That responsibility arose largely from the federal role as a guarantor of Indian rights against state encroachment. . . . We must presume that Congress intend[s] to exercise its power in a manner consistent with the federal trust obligation. . . .
> Respect for the long tradition of tribal sovereignty and self-government also underlies the rule that state jurisdiction over Indians in Indian country will not be easily implied. . . . Vague or ambiguous federal statutes must be measured against the "backdrop" of tribal sovereignty, especially when the statute affects an area in which the tribes historically have exercised their sovereign authority or contemporary federal policy encourages tribal self-government.

Id. at 1469-70. The Court went on to hold that the EPA's trust responsibility warranted excluding Indian lands from an otherwise approved state hazardous waste program. In accordance with the federal trust responsibility to protect tribal resources and authority,

"the state [was] required to yield to an exercise of jurisdiction by the federal government." *Id.* at 1470-71.

The EPA has the authority under the Clean Water Act to promulgate federal water quality standards for the Penobscot Indian Reservation to protect the Nation's sustenance fishery or to approve the Tribe's own promulgated water quality standards, to refrain from approving Maine's, and to take measures to protect the Tribes' sustenance fishery in the meantime. That is precisely what is required by the EPA's constitutionally-based trust obligation to the Penobscot Nation here. *See Wisconsin v. E.P.A.*, 266 F.3d 741, 747 (7th Cir. 2001) (Wood, J.) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." . . . U.S. Const., Art. I, § 8, cl. 3. In fact, in the absence of tribal TAS status, the EPA and not the state of Wisconsin might well be the proper authority to administer Clean Water Act programs for the reservation"). Indeed, were the EPA to approve Maine's WQS, it would unlawfully abdicate its trust responsibility by empowering Maine to control tribal resources when Maine does not even recognize the existence of the Nation's reserved sustenance fishery. This would be a breach of the EPA's trust responsibility to the Tribe and a constitutionally suspect undertaking because, by virtue of the Constitution, the EPA may not relinquish its trust responsibility to the Nation and leave it at the mercy of a hostile state.

A. Clarification of the Penobscot Nation's Position.

As an aside, the Penobscot Nation sees fit to make perfectly clear its position here, given the misstatements that have been made by Maine and pollution dischargers into the

Penobscot River in other contexts: the Nation claims no authority to regulate the discharges of paper mills or municipalities into the Penobscot River. The First Circuit's decision in *Maine v. Johnson*, established that Maine has that authority. The Nation's position here is that Maine does not have authority to impose its own WQS within the Penobscot Nation's sustenance fishery and that such authority must reside with federal government as the Tribe's trustee, in the first instance, or eventually with the Penobscot Nation. By asserting that such authority must reside with the EPA in the first instance and may ultimately reside with the Penobscot Nation, the Tribe is *not* asserting regulatory authority over any pollution dischargers into the Penobscot River.

The ability of the Nation to promulgate water quality standards is a long ways off, but that opportunity must be preserved because, as explained more fully below, it involves the exercise of the Nation's inherent sovereign authority, which Congress did not divest by the terms of the Settlement Act, and which is expressly excluded from state authority as an "internal tribal matter." But if and when the Nation were to promulgate its own water quality standards, the Nation *would not thereby regulate any pollution dischargers in the River*. As the Seventh Circuit has explained:

> *The tribe cannot impose any water quality standards or take any action that goes beyond the federal statute or the EPA's power. To the contrary, the EPA supervises all standards and permits.* Far from allowing a tribe to veto a state permit, granting TAS status to tribes [in recognition of their water quality standards] simply allows the tribes *some say* regarding those standards and permits. It is quite possible that, in particular cases, perhaps through the vehicle of the statutory mediation mechanism, the EPA may require [a] tribe's more stringent standards to give way to upstream discharge and development. Whether the tribe or the state ultimately "wins" in the dispute, *it is the EPA, not the tribe* or the state, *that has the ultimate authority to decide whether or not to issue a permit.*

Wisconsin v. E.P.A., 266 F.3d at 749-50 (emphasis added).

II. Congress Did Not Grant Maine Authority To Promulgate Water Quality Standards For the Nation's Reservation Sustenance Fishery, Which the State Refuses to Recognize.

While it is no doubt true that the relationship between the Tribes and Maine is unique because of certain express divestitures of tribal authority and grants of state authority established by Congress in the Settlement Act,[3] the framework for understanding the effect of the statutory terms is not unique. Such framework is established under federal Indian common law and the Constitution, and must be considered prior to any examination of the Settlement Acts. *See Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999), *cert. denied*, 527 U.S. 1022 (1999) (citing U.S. Const. art. I, sec. 8, cl. 3); *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994).

The essential features of this framework are well-established.

1. The powers of Indian tribes exist by virtue of their original status as governments, predating the Republic. *Narragansett Indian Tribe* at 694; *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065-1066 (1st Cir. 1979). They are not granted by the federal government. *Id.* at 1065. Rather, they are the "inherent powers of a limited sovereignty which has never extinguished." *Id.* at 1065-66 (quotations, citations and emphasis omitted). These attributes of sovereignty exist "only at the sufferance of

3 *See, e.g.*, 25 U.S.C. § 1725(d) (divesting Tribes of inherent sovereign immunity from suit); 30 M.R.S.A. § 6206(1) (imposing municipal-like liabilities upon the Tribes); 25 U.S.C. § 1725(c) (divesting Tribes of protections against state jurisdiction over crimes committed within their territories). Compare Canby, AMERICAN INDIAN LAW (West 2005) at 72-104 (describing attributes of tribal sovereignty and attendant constraints on state authority).

Congress" and are "subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *Id.* at 1066 (quotations, citations and emphasis omitted).

2. Since the power to divest Tribes of their attributes of sovereignty rests exclusively with Congress, these attributes cannot be lost by implication, by acquiescence to state power, or through non-use. A tribe's "sovereign power, even when unexercised, is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). *Accord Narragansett Indian Tribe*, at 701-02; *Bottomly*, at 1066. And such power carries with it "a historic immunity from state and local control." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

3. As explained above, since Indian tribes are considered "wards" of the federal government, there exists a unique trust relationship between the United States and tribes, grounded in the Constitution. That federal trust responsibility includes a duty to protect Indian tribes and their resources from encroachments by states. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832); *Washington Dep't of Ecology v. EPA*, 752 F.2d at 1470. There is a "deeply rooted policy in our Nation's history of leaving Indians free from state jurisdiction and control." *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (citations and quotations omitted). Thus, "[i]n the absence of federal authorization, . . . all aspects of tribal sovereignty . . . [are] privileged from diminution by the States." *Three Affiliated Tribes of Ft. Berthold v. Wold Eng'g*, 476 U.S. 877, 891 (1986).

a. The federal trust doctrine also requires the federal courts to observe that ordinary rules of statutory construction "do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). *Accord Fellencer,* at 709. "[S]tatutes or treaties relating to the Indians shall be construed liberally and in a non-technical sense, as the Indians would naturally understand them, and never to the Indians' prejudice." *Passamaquoddy v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). *Accord Narragansett Indian Tribe,* at 702.

4. Since the sovereignty held by tribes is fragile in the face of external pressures, and, pursuant to the Constitution, Congress has exclusive and plenary authority over Indian affairs, absent a crystal clear directive from Congress, the federal courts (and agencies) must avoid undermining the traditional attributes of tribal authority or allowing states to undermine such authority. *See, e.g., Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758-60 (1998); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 72 (1978); *Williams v. Lee*, 358 U.S. 217, 219-220 (1959). Thus, when Congress is silent on whether a particular attribute of tribal sovereignty remains, the "proper inference is that the sovereign power remains intact." *Merrion,* 455 U.S. at 148 n.14.

5. Congress is presumed to have known this well-established framework upon compromising the Tribes' historic land claims against Maine and enacting the Settlement Act. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997). Indeed, citing directly to the First

Circuit's decision in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) in its final committee reports, Congress said that the Tribes came to the Settlement Act in 1980 "possess[ing] inherent sovereignty to the same extent as other tribes in the United States" and were "entitled to protection under the federal Indian common law doctrines." S.Rep. No. 96-957, at 13-14; H.R.Rep. No. 96-1353, at 13-14, *reprinted in* 1980 U.S.C.C.A.N. 3789-90.

* * *

Given this framework, the first question to ask with respect to Maine's asserted authority to establish standards governing the Nation's sustenance reservation fishery is whether an attribute of the Tribes' inherent sovereignty is at stake and, if so, whether Congress unequivocally destroyed it by giving it to Maine.

A. Congress Did Not Divest the Penobscot Nation of Its Essential Authority to Protect the Sustenance Reservation Fishery and Turn that Authority Over to Maine.

The attributes of sovereignty that Tribes possess, absent their divestment by the federal government are well-established, *see Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 62 (1st Cir. 2005), and Maine's request for approval of its WQS in the Nation's sustenance fishery implicates one at the core: the inherent authority of tribes to address reservation intrusions that directly threaten the "health or welfare of the tribe." *See, e.g.*, *Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Wisconsin v. EPA*, 266 F.3d at 750; *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996). *See also Fellencer*, at 710 (quoting *Montana*). Water rights and governmental jurisdiction are "two . . . *critical elements* necessary for tribal sovereignty." *City of Albuquerque v.*

Browner, 97 F.3d 415, 418 (10th Cir. 1996) (emphasis added). This agency action clearly implicates this core matter of tribal sovereignty. *See generally* Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources*, 20 J. LAND RESOURCES & ENVTL. L. 185, 192 (2000). More specifically, this case involves the regulation of a matter of the very survival of an unique Indian tribal people: what water quality standard will protect the Nation's sustenance fishing in the Penobscot River both in terms of (a) the fish consumption rate and (b) what is an acceptable cancer rate for tribal members engaged in fishing in their aboriginal homeland, the Penobscot River. It is no exaggeration to say that this case is pivotal for the long-term health of this reservation fishery set aside for the sustenance of Penobscot tribal members and it therefore affects the very cultural and spiritual well-being of the Penobscot Nation.

So framed, the question presented is whether Congress, pursuant to the Settlement Acts, unequivocally *abrogated* the Tribe's inherent authority to protect this sustenance fishery and unequivocally turned that authority over to Maine. Absent any such clear intent on the part of Congress, this Agency must not give that authority to Maine.

In the Settlement Act, Congress did not divest the Nation of this sovereign authority. On the contrary, Congress recognized that the Nation's sustenance fishing right is an expressly retained sovereign authority and the United States has, time and again, confirmed it as such. *See, e.g,* Exhibit 17 to NPDES Public Comments. Indeed, upon enacting the Settlement Act, Congress confirmed the Penobscot Nation's aboriginal fishing rights within the Penobscot River by ratifying 30 M.R.S.A. § 6207(4), which provides, in pertinent part, that "notwithstanding any . . . law of the State, the members of

. . . the Penobscot Nation may take fish, within the boundaries of their . . . Indian reservation[], for their individual sustenance." 25 U.S.C. §1721(b). If this express confirmation of authority were not enough, the legislative history of the Settlement Act makes clear that the Tribe's separate sovereign authority, including the power to set water quality standards sufficient to protect the health of tribal members engaged in the taking of fish for their individual sustenance, as protected by federal law (including the Clean Water Act) was retained by the tribe: The final Senate Committee Report on the Settlement Act explained that Congress recognized "the independent source of tribal authority, that is, the *inherent authority of a tribe to be self-governing*. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)." Senate Report at 29 (emphasis added). It further explained that the Nation's qualified agreement to adopt certain State laws as their own, other than with respect to internal tribal matters such as regulation of the sustenance fishery (*see* 30 M.R.S.A. §§ 6202, 6206, 6207), would "*not violate the principles of separate sovereignty*." Senate Report at 29 (emphasis added). The report continued, "[t]hough identical in form and subject to redefinition by the State of its laws, the laws are those of the tribes." *Id.* (citing *Wauneka v. Campbell*, 22 Ariz. App. 287, 526 P.2d 1085 (C.A. 1974)).

The Senate Committee Report, which is authoritative, *see Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997), cannot be ignored. Congress intended *Wauneka v. Campbell* to fully inform the terms of the Settlement Act. In *Wauneka v. Campbell*, the Arizona Court of Appeals held that the State of Arizona could not enforce its Motor Vehicle Safety Responsibility Laws against Indians on the Navajo reservation,

notwithstanding the fact that the Navajo Tribal Code required all Navajo Indians residing on the Navajo Reservation in Arizona to obtain an Arizona Driver's license. Noting that the Navajo Nation, within its reservation, had police power authority to govern the activities of tribal members, the court held that imposition of Arizona's Motor Vehicle Safety Responsibility Laws would interfere with the Nation's right to self-government. The Nation's adoption of the Arizona Driver's licensing requirements as its own did not prevent it from enacting laws more suitable to its territory and members, nor did it constitute consent to allow state jurisdiction over the reservation. *See id.* at 1088-89. As the court explained:

> The Tribe in requiring its members who drive on the Reservation to be licensed by the state in which they live insures that those driving on the Reservation have demonstrated certain minimal skill and knowledge relative to the operation of motor vehicles. The tribal driver's license statute has not ceded either civil or criminal jurisdiction over Reservation events to Arizona courts or administrative agencies.

Id. at 1089.

This is of no small significance. It shows that by virtue of 30 M.R.S.A. § 6204 as ratified by Congress, Congress did not supplant the Penobscot Nation's sovereign authority by ensuring that Maine's law would apply to the Nation and to its resources. Rather, section 6204 simply confirmed that the Tribe would adopt State law as its own at least to the extent that internal tribal matters are not affected. In other words, the Nation is free to use state law standards as a floor and to provide more legal protection where "internal tribal matters" are at stake. In short, for the Penobscot Nation, section 6204 merely confirms that the Nation will adopt Maine law as its own, but it does not

expressly impose any form of state regulatory authority upon the Tribe or its natural resources.

In addition, at the time of the Settlement Act, Congress, through its final committee reports, addressed as "*Special Issues*" the Tribes' fears that the Settlement Acts would amount to a "*destruction*" of their "sovereign rights and jurisdiction." S.Rep. No. 96-957 at 14 (emphasis added); H.R.Rep. No. 96-1353 at 14-15, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3790 (emphasis added). Congress assured the Tribes that they came to the Settlement Act possessing the attributes of "inherent sovereignty to the same extent as other tribes in the United States," and that, under *Bottomly*, they were "entitled *to protection* under the federal Indian common law doctrines." S.Rep. at 13-14 (emphasis added); H.R.Rep. at 13-14, *reprinted in* U.S.C.C.A.N. at 3789-90 (same). One "Special Issue" that was expressly addressed was the Tribes' fear that the Settlement Act would destroy their fishing rights. Congress assured the Tribes that this was not the case and that their sustenance fishing right was an example of an "expressly retained sovereign activit[y]." S.Rep. at 15; H.R.Rep. at 15, *reprinted in* 1980 U.S.C.C.A.N. at 3791. Again, by its plain language, the Settlement Acts confirmed that the members of each Tribe would be able to take fish "for their individual sustenance," within the Tribes' respective reservation boundaries. 30 M.R.S.A. § 6207(4), *ratified by* 25 U.S.C. § 1721(b).

Nothing could be more at the core of this Tribe's existence than the reliance of its tribal members on their ability to take sustenance, culturally, spiritually and physically, from the Penobscot River. To turn over the regulation of that matter to Maine would

violate the preservation of this right for the Tribe to govern first pursuant to Maine law and second, where internal tribal matter are implicated, beyond the protections that Maine law provides.

The word "sustenance" is defined as "means of sustaining life; nourishment." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE at 1433. Thus, even absent the liberal reading of Congress's reservation of the right of these Tribes' members to take fish for their "sustenance," it is clear, by this plain meaning, that Congress intended that right to carry with it a right to catch fish that would provide nourishment, not contaminated fish or "whatever fish are available" as the State would have it. Congress did not simply say the Tribes had the right to fish. It said they had the right to fish for "sustenance." The problem here, as explained below, is that Maine fails to account for such sustenance and cannot be entrusted responsibility to do so. Indeed, in actual practice, the promises of a trustee to a dependent beneficiary, is lodged in the federal government, not the State.

B. The First Circuit's Decision in *Maine v. Johnson* Does Not Control the Agency Decision Here

While the United States Court of Appeals for the First Circuit has held that the State of Maine has jurisdiction to run the permitting program for NPDES discharges, this does not permit the State to regulate the Tribe's sustenance fishery, including (1) the internal tribal matters of how much fish a tribal member can safely eat, or (2) what is an acceptable cancer risk for those tribal members. *Maine v. Johnson*, 498 F.3d 37, 48 (1st Cir. 2007) ("we take no view today as to the ultimate resolution of these potential

issues."). Under longstanding principles of federal Indian law and EPA policy reflecting that law, the Nation's inherent authority to protect its aboriginal fishery must be given primacy over Maine.

Thus, while Maine may continue to administer the NPDES program, the ability to set standards that are sufficiently protective of the health of tribal members engaged in the taking of fish for their individual sustenance remain with the EPA and the Penobscot Nation, not Maine. *See EPA Policy for Administration for Environmental Programs on Indian Reservations* (Nov. 8, 1984); EPA, *Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* (July 10, 1991) at 3-4 (EPA will retain enforcement primacy for reservation pollution when tribe cannot demonstrate jurisdiction over certain sources). *See also HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1245 (10th Cir. 2000) ("The federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction.").

C. Congress' Express Recognition that The Sustenance Fishery Shall Not Be Subject To Regulation By the State and the *Akins/Fellencer* Factors Demonstrate that Setting Water Quality Standards Sufficient To Protect The Sustenance Fishery Is An Internal Tribal Matter

This agency proceeding is not *Maine v. Johnson,* which simply dealt with the authority of Maine to administer the NPDES permitting program, not to directly determine how to protect particular uses of reservation resources, here in a setting where the State refuses to even recognize them. Thus, the EPA should employ the *Fellencer/Akins* standards. *See Akins,* at 488-490 (considering factors); *Fellencer,* at 710-712 (same). Applying those standards, the establishment of water quality standards

for the Nation's reservation sustenance fishery must be deemed an "internal tribal matter" over which state jurisdiction is barred.

1. Whether the Matter Concerns Only Tribal Members or Affects Non-Indians

The "matter" at issue, determination of the acceptable cancer risks and fish consumption rates of Tribal members engaged in a sustenance fishing in tribal waters in order to set WQS in Indian territories, directly affects the health and welfare of tribal members in and around their principal reservation, and has only an indirect effect on non-Indians. As described above, the structure of the CWA provides that upstream and discharges may need to take into account the WQS set for the Nation's sustenance fishery in the Penobscot River, but this is a minor, indirect effect imposed by Congress, and is the same indirect effect that all non-Indians are subject to when water quality standards are set in Indian Territory. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105-110 (1992); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). Moreover, the guaranteed right to a tribal sustenance fishery must be taken into account for any WQS. The EPA's trust authority, or the Tribe's own authority to determine what is an acceptable health risk to tribal members engaged in a sustenance fishery has only an incremental effect on non-Indians who would already be subject to WQS that must be protective of the sensitive sub-population of tribal sustenance fishers. To put Maine in control of determining acceptable health risks for tribal members engaged in sustenance fishing on tribal waters is to permit the State to effectively eliminate any tribal sustenance fishing right by setting levels that are not adequately protective of tribal health. In context, the interests of non-

members cannot outweigh the paramount interests of the Tribe, the concomitant federal trust interest, and the federal goals of the Clean Water Act.

2. Whether the Matter Concerns the Harvesting or Deriving of Value from Tribal Resources

Attendant to the Tribe's reserved sustenance fishing right is the right to water in sufficient quantity, and of sufficient quality, to preserve sustenance fishing. *See United States v. Adair*, 723 F.2d 1394, 1408-11 (9th Cir. 1983). The Nation's reserved right to take fish "for sustenance" is more than a mere right of tribal members to dip their nets into the water in the hopes of catching a fish. *See Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658, 676, 679 (1979). Rather, it is (at the very least) a legally protected interest to have fish in the river of sufficient health and quantity to provide tribal members with a "moderate living." *Id.* at 686; *United States v. Adair*, 723 F.2d at 1414-15. Control over water quality standards for the Nation's sustenance fishery is essential for the growth, health, and reaping of this critical reservation. *Akins*, at 487-88

3. Whether the Matter Concerns the Regulation or Conservation of Tribal Resources

The *Akins* Court described the timber permitting policy at issue as "control over the growth [and] health" of a tribal resource and the "regulation and conservation of natural resources." *Akins*, at 487-88. Further, in the face of Congressional silence about imposing state law upon that concern, the First Circuit refrained from concluding that state law operated in this domain, since "the inherent self-governing authority of a tribe" appeared to be at stake. *Id*. at 489. Identical concerns are at issue here (even more so):

control of the WQS in the Penobscot River directly implicate the health and welfare of tribal member in reference to their use and consumption of a reservation resource. EPA's retention of the authority to set standards sufficiently protective of the tribal sustenance fishery is at least equivalent to, if not more imperative than, preserving and protecting tribal prerogatives from being undermined by the State at issue in *Akins*. Because "the inherent self-governing authority of a tribe," (albeit, one not, as yet, not fully exercised) is at stake here, this *Akins* factor points to reserving the matter from Maine's control.

4. Whether the Matter Implicates Interests of the State of Maine

Stripped of its dressings, the only interest Maine can legitimately assert in setting the WQS applicable in the Penobscot Indian Reservation is the subordination of the Nation and its interest in protecting its reservation fishery. Maine has no trust responsibility to protect that fishery and refuses to acknowledge that it is even part of the Penobscot's reservation. Only the EPA or the Tribe itself can ensure the protection of this critical tribal resource, and if Maine succeeds in its application here, it will have succeeded in its endeavor to end any say of the Tribe with respect to matters involving its very survival as a unique Indian people dependent upon the River from which they derive their name.

5. ***Whether, Under Federal Indian Common Law Principles, the Matter Involves the Inherent Authority of an Indian Tribe, Free From Undermining By a State***

Proper consideration of federal Indian law precedents to the "matter" at issue – the right to determine acceptable cancer risks and fish consumption rates of tribal members engaged in a sustenance fishery in tribal waters in order to set WQS in Indian territories -

- leaves no doubt that it is a core attribute of tribal authority, protected from any undermining by a state and, therefore, subject to preservation by the federal government. *See Washington Dep't of Ecology*, 752 F.2d at 1470-1472. *See also Wisconsin*, 266 F.3d at 747-48; *Montana v. EPA*, 137 F.3d at 1140-41; *Albuquerque*, 97 F.3d at 423. Pursuant to federal Indian common law principles, Indian tribes throughout the United States are free from the state intrusion of setting water quality standards within their reservation waters.

* * *

To state the precise "matter" is, virtually, to identify it as an "internal tribal matter." It is the right to determine acceptable cancer risks and fish consumption rates of Penobscot Nation tribal members who engage in their aboriginal right to fish for their sustenance in the Penobscot River. The WQS at issue must protect the practices of this Indian tribe, practices that it has relied upon for its physical, cultural and spiritual sustenance since aboriginal times. The State presumes to usurp this matter to itself and it unabashedly presumes authority to announce its own standards for what is necessary to protect this Indian tribe's aboriginal sustenance fishery. It is hard to imagine a worse intrusion into the Penobscot Nation's "internal tribal matters."

III. The EPA Must Deny Approval of Maine's WQS Within the Nation's Reservation Sustenance Fishery That Are Insufficiently Protective of the That Fishery.

The United States' trust responsibility to the Indian tribes is the result of common law doctrine that has developed over nearly two centuries:

> [Indian tribes] occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases--meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

Cherokee Nation v. State of Georgia, 30 U.S. 1, 10 (1831) (Marshall, J.); *see also Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right,* 30 Envtl. L. 279, 291 (2000); Cassandra Barnum, *A Single Penny, an Inch of Land, or an Ounce of Sovereignty: The Problem of Tribal Sovereignty and Water Quality Regulation Under the Maine Indian Claims Settlement Act*, 37 Ecology L.Q. 1159, 1194 (2010).

This trust responsibility extends to the protection of tribal health and natural resources. *See United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983) *(quoting Seminole Nation v. United States,* 316 U.S. 286, 296 (1942)).

Thus, even if Maine's water quality standards satisfy the requirements of the CWA and attendant regulations for the population at large, EPA nevertheless must by virtue of its trust responsibility to Indian tribes reject those standards as applied to Indian territories, when tribal members engaged in sustenance fisheries will be disproportionately impacted by water contamination. In the matter here, there is no doubt that Maine cannot be entrusted to protect the Tribe's aboriginal sustenance fishery.

EPA's interpretation of the Clean Water Act and attendant regulations no doubt implicate the trust responsibility and therefore require higher water quality standards than those issued by any state when state standards do not adequately support the legally

established interest of an Indian tribe: here, a fishery that must sustain an Indian tribe and its members. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1986) (citing "the familiar rule of statutory construction that doubtful expressions must be resolved in favor of Indians")

Even where water quality standards may be sufficient to protect fish populations from disease and death, they may not be approved where they do not prevent toxic bioaccumulation in fish to protect Indian tribes that have a legally protected sustenance fishery. While the fish may not die in multitudes and, therefore, the natural resource may be protected in one sense, the standards at their current levels do not adequately protect natural resources to adequately sustain a Native American population identified by Congress to have a specific right to use the resource for sustenance. As a factual matter, protecting human health often requires more stringent standards than protecting the environment alone. As a legal matter, therefore, the trust requires the EPA to reject state water quality standards that are insufficiently protective of the health of Penobscot Nation tribal members as the legally protected consumers of Penobscot River fish for their sustenance. The Supreme Court makes this perfectly clear: the "punctilio of honor the most sensitive" requires, or at least allows, the federal government to manage tribal resources in such a way as to maintain their usefulness to the Tribes. *Seminole Nation v. United States*, 316 U.S. 286, 297 & n.12 (1942) (*quoting Meinhard v. Salmon*, 164 N.E. 545, 546 (1928)). This is particularly true where, as here, Congress has expressly recognized the tribal right to the sustenance fishery.

EPA's current focus on environmental justice as a policy area of particular concern should also weigh in favor of taking action to protect tribal resources. See, e.g., Hearing on EPA's 2011 Budget Proposal, Senate Committee on Environment and Public Works, 111th Cong. (2010) (statement of Lisa P. Jackson, Administrator, U.S. Envtl. Prot. Agency)("We have begun a new era of outreach and protection for communities historically underrepresented in environmental decision making. We are building strong working relationships with tribes, communities of color, economically distressed cities and towns, young people and others, but this is just a start. We must include environmental justice principles in all of our decisions."); Exhibit 14 to NPDES Public Comments ("President Clinton's recent Executive Order regarding environmental justice should be applied to this permit process. As you know, one purpose of the Order and the federal government's increased emphasis on environmental justice is to ensure that minorities in our society live in healthy communities.... Due to the island location of its reservation, the Penobscot Indian Nation is subject to a disproportionate burden of the risks and harms occasioned by industrial plants ....")).

In contrast, Maine has made very clear, not only in its submissions to this Agency, but in its historical resistance to the actions of federal agencies to protect tribal interests in water resources, that it will not protect these unique tribal uses. Maine refuses to recognize that the Tribes have a reservation right to fish of a quality to provide sustenance to tribal members. *See, e.g,* Brief of the State of Maine to the First Circuit in *Maine v. Johnson*.

Thus, apart from the jurisdictional barrier that "internal tribal matters," including the taking fish by tribal members "for their individual sustenance," "shall not be subject to regulation by the state." 25 U.S.C. § 1721(b) (ratifying 30 M.R.S.A. §§ 6206(1), 6207(4)), EPA cannot approve Maine's WQS in Indian territories because it would constitute an abdication of its trust authority to the Nation; EPA should not cede to Maine the ability to set WQS in Indian territories in Maine. EPA should therefore retain for itself in consultation with the Nation authority to set WQS sufficiently protective of the tribal sustenance fishery.

IV. The EPA's approval of Maine's WQS Would Be Arbitrary And Capricious Because Maine's WQS Are Premised on the Physical Impossibility that Tribal Members Consume Different Amounts of Fish Depending on the Particular Pollutant at Issue

The State originally proposed 9,900% increase in the permissible concentrations of inorganic arsenic AWQC for Human Health criteria of both "Organisms Only" and "Water and Organisms" for waters in the State of Maine outside Indian territories (increasing respectively from 0.028 µg/L to 2.8 µg/L and 0.012 µg/L to 1.2 µg/L). The EPA determined that such standards were not sufficiently protective of the sensitive subpopulation of tribal sustenance fishers. The State now asks EPA to approve for Indian territories in Maine an even greater increase (13,114% increase for "Organisms only" and 10,733% increase "Water and Organisms") in the permissible concentrations over those that formerly applied elsewhere in the state. These newly proposed standards are not sufficiently protective of tribal sustenance fishers and should not be approved in Indian territories in Maine.

The proposed standards would also be arbitrary and capricious if they were applied to Indian territories. Maine proposed to use a fish consumption rate of 138 g/day for the purpose of determining acceptable levels of inorganic arsenic, but use a consumption rate of 32.4 g/day for all other pollutants. Even 138 g/day is below the estimated intake of tribal sustenance fisherman, which has been estimated at 286-514 g/day. *See* Wabanaki Traditional Cultural Lifeways Exposure Scenario, at 62-63 (July 9, 2009) available at **http://www.epa.gov/ne/govt/tribes/pdfs/DITCA.pdf** (hereafter Wabanaki Study). The Wabanaki Study was conducted, in a joint effort between the EPA and the Maine Tribes, expressly for the purpose of determining WQS in Indian territories in Maine:

> This document presents the Wabanaki Cultural Lifeways Exposure Scenario, a numerical representation of the environmental contact, diet, and exposure pathways present in traditional cultural lifeways in Maine. This project was a coordinated effort among the five federally recognized Tribal Nations in Maine and the US EPA.
> …
> The purpose of this report is to describe Maine tribal traditional cultural uses of natural resources, and to present them in a format that can be used by EPA to evaluate whether or not tribal uses are protected when they are requested to review or develop water quality standards in waters that include Indian territories in Maine. Present-day environmental conditions may not allow many people to fully engage in a fully traditional lifestyle until resources are restored, but this is still an 'actual' and not 'hypothetical' lifestyle.
> …
> This report will enable EPA to understand Tribal use of the water resource for food, medicine, cultural and traditional practices, and recreation so that EPA can evaluate whether or not those uses are protected regardless of who develops water quality standards.

Wabanaki Study at 7-8. The Nation hereby incorporates by reference the entire Wabanaki Study. This is the only "local data on fish consumption" available with regard

to Indian territory and so is the preferred value for purposes of WQS. EPA's AWQC Methodology (Sections 1.6, 2.6, 2.8.2). Maine ignores this study and uses a 1992 ChemRisk study as evidence that the 32.4 g/day and 138 g/day rates it uses in its ambient water quality criteria are protective of Maine tribes. However the ChemRisk study is flawed and does not accurately reflect consumption rates of Penobscot or other tribal people. First, the ChemRisk study only captures consumption of fish from State, not tribal waters. Second, it captures suppressed consumption rates in the presence of health advisories when people were being warned against consuming fish from Maine rivers, including the Penobscot. The surveys for the study were done in 1990, while the Maine Bureau of Health and the ME DEP have issued fish consumption advisories since at least 1987 for the Penobscot (including more restrictive advisories in 1990). Third, because the ChemRisk study only surveyed people that held a 1989 Maine resident recreational fishing license, it is not representative of Penobscot sustenance fisherman. Penobscot tribal members get sustenance fishing licenses directly from the tribe and are not required to get Maine recreational licenses to fish in tribal waters, including the Penobscot River. In the Nation's experience, tribal people who carry out subsistence lifestyles are not likely to be captured in mail or telephone surveys.

Maine discounts the Wabanaki study because it argues that it does not constitute "empirical" data as compared with the ChemRisk study. There is no basis in the Clean Water Act or the implementing regulations for this distinction. Instead the EPA recommends "local data on fish consumption in place of this default value when deriving AWQC." EPA's AWQC methodology Section 1.6. The Wabanaki study constitutes

"local data" with regard to Indian territories (while the ChemRisk study does not). The Wabanaki Study was created precisely for use in WQS determinations, and it fully justifies its methods. The consumption of fish for sustenance is a present use of waters in Indian territories, and there is nothing in the Clean Water Act or its implementing regulations to suggest that it is improper to look to data that is based in part on information that predates the Clean Water Act in determining the appropriate fish consumption rates sufficient to protect modern day tribal sustenance fishers.

The consumption rates from the Wabanaki Exposure Scenario more accurately reflect sustenance fishing practices and demonstrate the inadequate protection offered by the proposed water quality standards. Any WQS standards that are directly applicable to Indian territories should use the consumption rates of the Wabanaki Study. These consumption rates should be used for all pollutants.

Similarly, the Nation objects to the use of a one in ten thousand cancer risk rate for the known carcinogen of inorganic arsenic. Maine uses a one in one million cancer risk rate for other carcinogens. It is offensive for the State of Maine to be purporting to determine what an acceptable cancer risk rate within Indian territory for sustenance tribal fishermen. As described above, we believe the State has no jurisdiction to make this determination, and further believe that the EPA, consistent with its permissible authority under its Trust responsibility, should not approve such a determination over the Nation's objection. The Nation further believes that it would be arbitrary and capricious to do so.

CONCLUSION

For all of the above reasons, the EPA should decline to approve Maine's proposed WQS within the Penobscot Nation's sustenance reservation fishery.

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